

The *Vivendi* Verdict: Three Key Issues

BY JORDAN ETH, MIA MAZZA & STACEY SPRENKEL

Jordan Eth and Mia Mazza are partners in Morrison & Foerster LLP's San Francisco office. Mr. Eth is Co-Chair of the firm's Securities Litigation, Enforcement, and White-Collar Defense Group, and also is a member of the Editorial Advisory Board of Securities Litigation Report. Ms. Mazza's practice focuses on representing issuers and related parties in federal and state securities litigation, including shareholder class actions, derivative actions, and matters involving director and officer liability. Stacey Sprenkel is an associate in the Litigation Department, and a member of the firm's Securities Litigation, Enforcement, and White-Collar Defense Group. Contact: jeth@mof.com, mmazza@mof.com or ssprenkel@mof.com.

On January 29, a jury in the Southern District of New York returned a verdict in favor of the plaintiffs in *In re Vivendi Universal S.A. Securities Litigation*. The verdict, reached after fourteen days of deliberation following a three-month trial, has received much publicity. *Vivendi* is only the ninth securities fraud class action tried to verdict since the passage of the Private Securities Litigation Reform Act of 1995 ("Reform Act"), and the fifth to result in a verdict for the plaintiffs.¹ The verdict—which *Vivendi*, a French media conglomerate, reportedly plans to appeal—raises many interesting issues for the securities litigation bar.

Three aspects of this case stood out to us:

Issue #1—Foreign Defendants, Foreign Plaintiffs, Foreign Exchange

Long before the trial began, *Vivendi* became notable for its treatment of the "Foreign-Cubed" issue—the shareholder class consisted primarily of (1) foreign citizens and residents, who (2) purchased shares of *Vivendi*, a foreign company, (3)

on a foreign stock exchange. The *Vivendi* defendants moved to dismiss these Foreign-Cubed (or "F-Cubed") investors for lack of subject matter jurisdiction, arguing that the scope of the implied private right of action under Section 10(b) of the Securities Exchange Act of 1934 does not reach their claims. The district court denied that motion in 2003, and in 2004 it denied a motion for reconsideration, finding subject matter jurisdiction based on the individual defendants' "conduct in the United States."² Although many securities fraud cases have addressed the F-Cubed issue in recent years, *Vivendi* is one of the few to find that Section 10(b) encompasses these types of claims.

On class certification, however, the district court in *Vivendi* excluded German and Austrian investors, finding that the plaintiffs had not demonstrated that it was

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probable that the courts of those countries would give preclusive effect to a judgment in a United States class action.³ The case proceeded with investors from other countries, including Vivendi's home country of France. These F-Cubed investors make up the vast majority of the plaintiff class that has now obtained a jury verdict potentially worth several billion Euros.

The question of whether and to what extent Section 10(b) reaches the claims of the *Vivendi* F-Cubed plaintiffs, however, is far from settled. In a post-verdict press release, Vivendi stated that it “believes strongly that this case raises significant legal issues for foreign corporations doing business in the United States that need to be definitively resolved.”⁴ The case also raises important public policy issues involving the proper role of the United States in policing foreign transactions between foreign parties.

Those issues may be resolved this summer: During the *Vivendi* trial, the U.S. Supreme Court granted certiorari in *Morrison v. National Australia Bank*,⁵ a case in which nearly 100% of the proposed class members were F-Cubed investors. Depending on the Supreme Court's ruling, the defendants in *Vivendi* may have an opportunity to reduce the size of the plaintiff class (and thus the damages award) dramatically. Moreover, the jury's finding (discussed below) of no liability as to the individual defendants calls into question whether the fraud in fact included any “conduct in the United States.” As subject matter jurisdiction is never waived,⁶ these are issues that Vivendi may be able to raise even post-judgment.

Issue #2—Damages Calculation by Jury

Vivendi is one of only two securities fraud trials in which the jury calculated damages on a daily per-share basis. The jury's completed verdict form listed a “per share” damages number for each of the roughly 400 days in the class period.⁷ (There remain questions regarding the total damages award—a second phase of the trial likely will focus on the calculation of individual claims and the resolution of individualized issues, such as reliance.)

While there are many court decisions on causation and damages issues at the motion to dismiss, class certification, summary judgment, and *Daubert* stages,⁸ there are few guideposts for proving damages at trial. Basic issues—such as whether the jury or the judge should decide on the method used to determine damages, and what latitude the jury should be given in making that determination—are rarely even addressed.

In *Vivendi*, the plaintiffs offered day-by-day calculations of per-share damages numbers.⁹ The defendants offered their alternative numbers, if the jury found liability.¹⁰ The jury findings, however, did not match either side's numbers. According to Vivendi's French counsel, “to calculate the damage, [the jury] simply divided into two [the] amounts proposed by the plaintiff.”¹¹

Even a quick review shows that there may be some anomalies in the jury's calculation. For example, the jury found that while there was inflation of €2.40 per share on September 10 and 29 of 2001, there was zero stock price inflation between September 11, 2001, and September 28, 2001.¹² This means that a class member who (for example) purchased Vivendi stock on September 10 and then sold on September 17 was damaged by fraud, even though the *only* intervening event was a terrorist attack on the United States, an unlikely “corrective disclosure” of any alleged misstatement.

Vivendi has identified “[p]laintiffs' erroneous method of proving and calculating damages” as one issue it plans to challenge.¹³ The courts' resolution of post-trial motions and appeals may also address issues regarding the jury's role in determining damages.

Issue #3—Company, but Not Individuals, Found Liable

The *Vivendi* verdict is also noteworthy in that the jury found that the company violated the securities laws with regard to all 57 allegedly false statements, but that the individual defendants—to whom many of the allegedly false statements were attributed—had not violated the securities laws at all. This finding raises questions about proving “corporate scienter.”

Securities litigators generally believe that a corporation does not have scienter unless an individual acting on behalf of the company acted with scienter. Courts have recognized that corporations act only through their agents (their officers and directors).¹⁴ While there are some differences among the circuit courts' holdings regarding corporate scienter,¹⁵ there is general agreement that proving corporate scienter requires "look[ing] to the state of mind of the individual corporate official or officials who make or issue the statement... rather than generally to the collective knowledge of all the corporation's officers and employees."¹⁶ The law in the Second Circuit is no different: "[t]o prove liability against a corporation... a plaintiff must prove that an agent of the corporation committed a culpable act with the requisite scienter, and that the act (and accompanying mental state) are attributable to the corporation."¹⁷

Consistent with the Second Circuit's holding, the *Vivendi* court instructed the jury:

For you to find that Vivendi, which can only act through its agents and employees, had the required state of mind for a statement, plaintiffs must prove that Mr. Messier, Mr. Hannezo, or another Vivendi agent or employee made the statement to the public with the required state of mind while acting within the scope of his or her authority. In other words, you must attribute to Vivendi the mental state possessed by the Vivendi agent or employee who made the particular statement.¹⁸

To assist the jury in carrying out this charge, the jury verdict form listed each defendant to whom each statement was allegedly attributed, separately for each of the 57 statements at issue. The completed form, however, reflects a finding that the individual defendants were not liable for any statement, but Vivendi was liable as to all of them.¹⁹

How is this verdict possible? With regard to written statements such as press releases, it could be that a non-defendant individual who participated in making the statement acted with the requisite scienter. But the 57 statements include oral statements made by former CEO Jean-Marie

Messier as well as former CFO Guillaume Hannezo.²⁰ If either individual made an oral statement without scienter, then whose scienter is being attributed to the company? This issue, as well, may become clarified through post-trial motions and appeal.

NOTES

1. Adam T. Savett, *Securities Class Action Trials in the Post-PSLRA Era*, RiskMetrics Group, Jan. 2010, at 2, <http://slw.riskmetrics.com/SCAS%20Trials.pdf>.
2. *In re Vivendi Universal, S.A.*, 381 F. Supp. 2d 158, Fed. Sec. L. Rep. (CCH) P 92619 (S.D. N.Y. 2003)(denying motion to dismiss); *In re Vivendi Universal, S.A.*, 2004 WL 2375830 (S.D. N.Y. 2004) (denying motion for reconsideration).
3. *In re Vivendi Universal, S.A.*, 242 F.R.D. 76, 105 (S.D. N.Y. 2007), reconsideration denied in part, 2009 WL 855799 (S.D. N.Y. 2009)(granting motion for class certification in part).
4. Press Release, Vivendi, *Vivendi Will Appeal to Overturn Jury Verdict*, at 1 (Jan. 29, 2010) <http://www.vivendi.com/vivendi/IMG/pdf/PR100129.pdf>.
5. *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 783 (2009), Docket No. 08-1191.
6. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506, 126 S. Ct. 1235, 163 L. Ed. 2d 1097, 97 Fair Empl. Prac. Cas. (BNA) 737, 87 Empl. Prac. Dec. (CCH) P 42264 (2006).
7. Jury Verdict Form at 58–68, *In re Vivendi* (S.D.N.Y. Feb. 4, 2010) (No. 02-cv-5571).
8. "Daubert" refer to guidelines set out in the Supreme Court ruling in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469, 27 U.S.P.Q.2d 1200, Prod. Liab. Rep. (CCH) P 13494, 37 Fed. R. Evid. Serv. 1, 23 Env'tl. L. Rep. 20979 (1993), concerning the admissibility of expert witnesses' testimony.
9. See Trial Transcript at 6899–901, *In re Vivendi* (S.D.N.Y. Jan. 6, 2010) (No. 02-cv-5571).
10. See Trial Transcript at 7437–38 *In re Vivendi* (S.D.N.Y. Jan. 11, 2010) (No. 02-cv-5571).
11. My World.News and Opinions, *Vivendi Condemned Messier Relaxed* (Jan. 31, 2010) <http://ecopolhome.com/vivendi-condemned-messier-relaxed/>.
12. Jury Verdict Form at 63, *In re Vivendi* (S.D.N.Y. Feb. 4, 2010) (No. 02-cv-5571).
13. Press Release, Vivendi, *Vivendi Will Appeal to Overturn Jury Verdict* (Jan. 29, 2010) <http://www.vivendi.com/vivendi/IMG/pdf/PR100129.pdf>.

14. See, e.g., *Caterpillar, Inc. v. Great American Ins. Co.*, 62 F.3d 955, 963 (7th Cir. 1995).
15. For example, there are some differences between the circuits courts regarding the pleading standard for corporate scienter, see, e.g., *Glazer Capital Management, LP v. Magistri*, 549 F.3d 736, 743, Fed. Sec. L. Rep. (CCH) P 95008 (9th Cir. 2008); *Makor Issues & Rights, Ltd. v. Tellabs Inc.*, 513 F.3d 702, 710, Fed. Sec. L. Rep. (CCH) P 94560 (7th Cir. 2008), and regarding the position of the individual who acts with scienter, see, e.g., *Nordstrom, Inc. v. Chubb & Son, Inc.*, 54 F.3d 1424, 1435-1436, Fed. Sec. L. Rep. (CCH) P 98,678, 32 Fed. R. Serv. 3d 217 (9th Cir. 1995), as amended on denial of reh'g, (Aug. 1, 1995)(officer or director must have requisite intent for corporate scienter).
16. See, e.g., *Southland Securities Corp. v. INSpire Ins. Solutions, Inc.*, 365 F.3d 353, 366-367, Fed. Sec. L. Rep. (CCH) P 92803 (5th Cir. 2004) and *Tellabs*, 513 F.3d at 708.
17. See, e.g., *Teamsters Local 445 Freight Div. Pension Fund v. Dynex Capital Inc.*, 531 F.3d 190, 195, Fed. Sec. L. Rep. (CCH) P 94763 (2d Cir. 2008).
18. See Trial Transcript at 7518 (Charge to Jury), *In re Vivendi* (S.D.N.Y. Jan. 11, 2010) (No. 02-cv-5571).
19. Jury Verdict Form, *In re Vivendi* (S.D.N.Y. Feb. 4, 2010) (No. 02-cv-5571).
20. See Trial Transcript at 7079-86, 7374, *In re Vivendi* (S.D.N.Y. Jan. 7-8, 2010) (No. 02-cv-5571).